

87-SBE-040

BEFORE THE STATE BOARD OF: EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MYRON A. RESNICK) No. 84A-1292-SW
)

Appearances:

For Appellant: Philip Altfest
Attorney at Law

For Respondent: Lorrie K. Inagaki
Counsel

O P I N I O N

This appeal is made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Myron A. Resnick against proposed assessments of additional personal income tax in the amounts of \$500.46, \$4,847.00, \$3,290.00, and \$1,403.00 for the years 1979, 1980, 1981, and 1982, respectively.

1/ Unless otherwise- specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

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The issue presented in this **appeal** is whether **appellant** was a resident of California during 1979, 1980, 1981, and 1982.

In 1961, **appellant** and his family moved to **Los Angeles** after **spending** three years in **Hawaii**. **Appellant**, in 1962, moved to San Diego where he owned a heating and air conditioning business. This business was sold in 1967, and **appellant** moved his family back to **Hawaii**. He purchased a home in **Hawaii** as well as some investment property. In 1975, **appellant** and his wife were divorced. **Appellant's** wife was given custody of their **three** children, and they remained with her in Colorado, where they had **moved** in 1973.

Appellant sold the family home in **Hawaii** in July of 1976 and **purchased** a large condominium in La Jolla, California. **Appellant** and his children lived in this condominium **from** 1979 through the taxable years in **issue**.

Appellant originally filed California resident tax **returns** for 1977, 1978, 1979, and 1980, and filed nonresident **Hawaii** returns for 1979 and 1980. He did not file **any** California returns for taxable years 1981 and 1982, **but he did** file **Hawaii** and **federal** returns.

Respondent examined **appellant's** returns for 1978 through 1980, and requested copies of **appellant's** **Hawaii** returns so that the credit taken for other state **income** tax could be verified. The **Hawaii** returns revealed **that** **appellant** had omitted reporting a \$162,234 capital **gain** on a 1979 real estate sale. Consequently, **respondent** adjusted **appellant's** 1979 tax liability to **include** the capital gains. After **respondent** issued the notice of proposed assessment, **appellant's** representative **filed amended** nonresident returns for 1979 and 1980, eliminating **all** income which was not California-source **income**. This filing **resulted** in claims for refund for 1979 and 1980; however, no action has yet been **taken on** these **claims**.

A revised notice of **proposed** assessment for 1979 was issued based on minor mathematical **adjustments** and on a determination that **appellant** was a resident of California **for** that year. Respondent also issued a notice of proposed assessment for taxable year 1980, adjusting the **"other states"** credit and treating **appellant** as a California resident. Similar action was taken for 1981 and 1982 which included **all of** **appellant's**

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income for those years as taxable California income, Appellant protested these notices and, **when** respondent affirmed its assessments, this appeal resulted.

Section 17041 requires a tax to be paid upon **all** the taxable income of each California resident. (Appeal of William **Harold** Shope, Cal. St. Bd. of Equal., **May 21, 1980.**) Section 17014, subdivision **(a)(2)**, defines a "resident" as **every** individual domiciled in California who is outside the state for a temporary **or** transitory purpose.

At the outset, it is necessary to distinguish between "residence" and "domicile." For our purposes, this distinction was enunciated in **Whittell v. Franchise Tax Board**, **231 Cal.App.2d 278 [41 Cal.Rptr. 673] (1964).** **in Whittell** the court stated:

"[D]omicile" properly denotes the one location with which for legal purposes a person is considered to have the most settled and permanent **connection**, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning but which the law may also assign to him constructively.' Residence, on the other hand, denotes any factual place of abode of some permanency, that is, more than a mere temporary **sojourn** [citation omitted].

(**Whittell v. Franchise Tax Board**, *supra*, **231 Cal.App.2d at 284.**)

A person's domicile is also generally described **as** the place where he lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart. (Appeal of Anthony J. and Ann S. **D'Eustachio**, Cal. St. Bd. of Equal., **May 8, 1985.**) In other words, the concept of domicile involves not **only** a physical presence in a particular place, but also the intention to make that place one's home.

Appellant has stated that he did not intend his domicile to be in California. However, the requisite intent is not to be determined merely **from unsubstantiated** statements, but rather the acts and declarations of the party must be taken into consideration. (**Estate of Phillips**, **269 Cal.App.2d 656, 659 [75 Cal.Rptr. 301] (1969).**) The facts in this case show that in **1961**, appellant moved to California and subsequently began a

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partnership known as Alliance Air Conditioning. Appellant stayed in San Diego until 1967 when he and his family moved to Maui and opened a branch of Alliance Air Conditioning. He also entered into the **real estate development** business. In 1973, appellant **and his** wife **separated** and she moved to Colorado with their children. The Hawaii house was sold, a condominium was purchased in California, and appellant moved into a **small Maui** condominium which had previously been one of his rental properties. Appellant and his wife had agreed that California was the best place for their children, in particular their son, Greg, to attend school. **The** condominium in California is a three-bedroom home where appellant and all his children resided at various times after January 1, 1979.

Appellant, therefore, had dwelling places in both Hawaii and California which had some of the aspects of a home. **When** determining which of appellant's dwelling places was his domicile, it must be established to which state appellant was **more** closely related. A dwelling will be considered to be the center of appellant's domestic, social and civil life if he and his family spend the greater part of their time **there** or if the dwelling is **more** spacious, contains the bulk of the household furnishings, and is the place in which he has shown the most interest. Appellant's La Jolla condominium is the larger of the two condominiums, with 2,200 square feet as compared to the 900 square feet in the **Hawaii** condominium. It was the **La Jolla** condominium that appellant improved by adding a hot tub and remodeling the patio. **It** was also this condominium in which he and his children lived while they took advantage of the California school system. The residence of family **members** is a highly persuasive indication of the place intended as a permanent home. (Broadstone Realty Corp. v. Evans, 213 F.Supp. 261, 265 (S.D.N.Y. 1962), affd., 367 F.2d 397 (2d Cir. 1966).)

Appellant, on his federal corporate income tax return for the income year ended November 30, 1981, stated that his address was La Jolla. On this return he deducted travel expenses of \$11,160 and telephone expenses of **\$2,989**. This appears to represent travel and phone calls connected with his Hawaii business as at this time appellant had sold his California business interests. **Because** appellant was not conducting business in San Diego, any travel to San Diego would not qualify as a business expense. Likewise, if appellant had considered

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Hawaii to be his home at that time, he would not have claimed a deduction **for** the travel to Hawaii.

The facts further show that appellant considered California to be his principal home as in his 1979 Hawaii tax returns he indicated that his children lived with him in La Jolla.

A similar statement **was made by appellant** on his 1981 federal income tax return. **Appellant further** claimed a La Jolla address on his 1979 and 1980 federal and **Hawaii** corporate returns and he had originally filed California resident tax returns for **1977** through **1980**.

Finally, appellant claimed a homeowner's **property** tax exemption on his La Jolla home. **California's** Constitution in subdivision (k) of **section 3** of **article XIII** provides that a homeowner's exemption may be taken only when the property is occupied by an owner as his principal residence. To get this exemption appellant signed a statement under penalty of perjury that the La Jolla home was his principal residence.

We must conclude, that although appellant had a condominium in Hawaii, his intent during the taxable years in issue was that the La **Jolla** condominium be his principal residence, Therefore, California was his domicile.

Because appellant was domiciled in California, he will be considered to be a California resident if his absence from California was **for** a temporary or transitory purpose. In the Appeal of David J. and Amanda Broadhurst, decided by this board on April 5, 1976, we **summarized** the regulations and case law interpreting the phrase **"temporary or transitory purpose"** and noted that:

Respondent's regulations indicate that whether a taxpayer's purposes in entering or leaving California are temporary or transitory in character is essentially a question of fact, to be determined by examining all the circumstances of each particular **case**.
[Citations.]

In determining whether appellant's stay in **Hawaii** was temporary or transitory, we must consider what connections appellant maintained with Hawaii. These are an important indication of whether his absence from or presence-in California is temporary or transitory in

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character. (Appeal of Earl F. and Helen W. Brucker, Cal. St. Bd. of Equal., July 18, 1961.) In other words, when appellant spent part of each year in Hawaii and the other part in California, with which state did he maintain the closer connection?

Initially, we note that respondent's determination of residency status, and proposed assessments based thereon, is presumed to be correct and appellant bears the burden of proving respondent's actions erroneous. (Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June 22, 1976.) The facts in this case indicate that respondent has accurately concluded that appellant was a California resident during the taxable years in question. The connections appellant kept with California are numerous. He acquired a three-bedroom home in which he and his children lived. He was listed in the La Jolla telephone directory and claimed the California homeowner's exemption on his La Jolla house. He had cars and a yacht registered in California and protected by California laws. His children enjoyed the benefits of California's school system. Appellant retained a California- accountant and a California attorney. Approximately half of his time was spent in California, although when his children were out of school for the summer and were visiting their mother or were working in Maui, appellant was not in La Jolla at all. This indicates most of the time he spent in La Jolla was to be with his family. The facts also indicate that appellant did obtain his health insurance in San Diego and did use the services of California-based doctors and dentists. While this board acknowledges that appellant had ties with Hawaii which were principally business related, we cannot conclude that appellant has carried his burden of proving that he was a Hawaii resident during the taxable years in question. The action of respondent must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and **good** cause appearing thetaylor,

IT IS **HEREBY** ORDERED, **ADJUDGED** AND **DECREED**, pursuant to section **18595** of the Revenue and **Taxation** Code, that the action of the Franchise Tax Board on the protest of Myron A. Resnick against proposed assessments of additional personal income tax in the amounts of \$500.46, **\$4,847.00**, **\$3,290.00**, and **\$1,403.00** for the years 1979, 1980, 1987, and 1982, be and the same is hereby sustained.

Dane at **Sacramento**, California, this 7th day of May , 1987, by the **State** Board of **Equalization**, with Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

<u>Conway il. Collis</u>	, Chairman
<u>William M. Bennett</u>	, Member
<u>Paul Carpenter</u>	, Member
<u>Anne Baker*</u>	, Member
<u></u>	, Member

*For Gray Davis, per Government Code section 7.9

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal-of)
Myron A. Resnick) **84A-1292** SW

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition filed on June 5, 1987, by Myron A. Resnick for rehearing of his appeal from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and ~~the~~ same is hereby denied and that our **order** of May 7, 1987, be and the same is hereby affirmed.'

Done at Sacramento, California, this 28th day
Of July, 1987, by the State Board of Equalization,
with Board Members Mr. Collis, Mr. Bennett, Mr. Carpenter and
Ms. Baker present.

Conway H. Collis , Chairman

William M. Bennett, Member

Paul Carpenter, Member

Anne Baker*, Member

_____, Member

*For Gray Davis, **per** Government Code section 7.9